76-5382

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-

WILLIE JASPER DARDEN,

Petitioner

- v. -

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida entered February 18, 1976 affirming his conviction for first-degree murder and other crimes and sentencing him to death.

Citation to the opinions below

The majority and dissenting opinions of the Supreme Court of Florida are reported at 329 So.2d 287 (Fla. 1976), and are set out in Appendix A hereto.

Jurisdiction

The judgment of the Supreme Court of Florida was entered on February 18, 1976. That court denied petitioner's application for rehearing on April 19, 1976. On May 14, 1976, Mr. Justice Powell granted a stay of execution of the death sentence imposed on petitioner and on July 8, 1976 the same

Justice granted petitioner's request for an extension of time to file a petition for certiorari to September 16, 1976.

Petitioner asserted below and asserts here the deprivation of rights secured to him by the Constitution of the United States; hence, jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Questions presented

1. Was petitioner's right to a fair trial denied to him by the prosecution's flagrantly prejudicial and inflammatory summation to the jury, when the misconduct was (i) repeated and persistent, (ii) intentional, (iii) unremedied by a curative instruction from the court, notwithstanding defense counsel's objection, (iv) unprovoked by defense counsel, and (v) of probable importance in persuading the jury to convict and to recommend imposition of a death sentence upon evidence of guilt that was far from overwhelming?

2. Was petitioner deprived of a federal constitutional right by testimony on the state's direct case of a one-on-one identification that occurred at a preliminary hearing, when this earlier identification had been both wantonly and needlessly suggestive?

3. Was petitioner deprived of rights accorded him by the Constitution by reason of two in-court identifications, both of which may have been the product of impermisslbly and needlessly suggestive pretrial identifications?

4. Were petitioner's constitutional rights infringed by the exclusion for cause of five veniremen who acknowledged that to vote in favor of the imposition of the death penalty upon petitioner would violate their moral and religious principles?

Constitutional provisions involved

This case presents issues under the Sixth and Fourteenth Amendments to the Constitution of the United States.

Statement of the case

(a) The events and proceedings below in brief

In the early evening of September 8, 1973 Carl's furniture store in Lakeland, Florida was held up, one of its owners, Carl Turman, was shot and killed as he entered through a back door, and Phillip Arnold, a sixteen year old boy who lived nearby, was shot and wounded as he sought to give aid to Mr. Turman (R. 203-09, 211-12, 430-38).* At about the same time as these occurrances, the petitioner, on weekend furlough from a Florida prison, lost control of his girlfriend's car as he drove toward her house in Tampa and struck a telephone pole adjacent to the highway (R. 331-32, 574-77, 600). The accident took place a little over three miles from Carl's furniture store (R. 508, 539).

*References are to the pages of the record on appeal to the Florida Supreme Court.

A few hours thereafter petitioner was arrested at the home of his girlfriend and later the same night was charged with the murder of Mr. Turman, the attempted murder of Mr. Arnold, and the robbery that accompanied these shootings (R. 586).

Following a change of venue to rural Citrus County (R. 138), Mr. Darden was tried for first degree murder and the other, lesser crimes in mid-January, 1974. The principal evidence proferred by the state was two-fold: the identification of petitioner by Mrs. Turman and Mr. Arnold (R. 224-26, 492), both of whom had furnished descriptions of the assailant immediately after the crime that bore little resemblance to petitioner, and testimony from a deputy sheriff who, on the day following the crime, had found a .38 calibre pistol in a ditch thirty-some feet from the highway and about an equal distance from the place of Darden's automobile accident the evening before (R. 503-04, 511). The pistol was shown at trial to be of the same calibre as the murder weapon and to have had four bullets fired from it, but was not connected to the crime by ballistic or other evidence of a more definitive character. (R. 357-58, 514, 517-22).

Petitioner testified at length on his own behalf (R. 571-659) and told how his automobile had skidded from the highway in wet weather as he hastened back to Tampa from Lakeland to meet his girlfriend and attend a wedding later on in the the evening (R. 574-76). Both he and witnesses called by the state explained that, with the aid of a passing motorist, he had sought unsuccessfully but with seeming equanimity to locate a wrecker to take the disabled auto in tow and, having

failed in this effort, had obtained a ride to Tampa (R. 577-79, 330-31, 334-35, 340-41). Petitioner denied having been at the furniture store or having anything whatever to do with the crimes with which he was charged (R. 592-93, 598-99).

Petitioner's recitation of the events of the evening of September 8 was neither implausible in itself nor, apart from the identification testimony of Mrs. Turman and Mr. Arnold, was it in direct conflict with the state's evidence.

In sum, at the close of the evidence, the prosecution's case for conviction was a doubtful one and depended, in large measure, upon the jury's acceptance of the identification testimony of the state's two principal witnesses. With this uncertainty, the summations to the jury took on particular importance.

The first of the two prosecutors to sum up for the most part confined himself to the evidence (R. 738-46); the second, Mr. McDaniel, largely ignored the evidence and devoted his address to what was surely a calculated effort to arouse the jurors' passions and to distract them from the proper performance of their task (R. 749-81). Thus, within less than thirty-five transcript pages, McDaniel time and time again focused upon the Florida Division of Corrections as that "unknown defendant" who, through the weekend furlough, had turned petitioner loose "on the public" (R. 749-52, 753-54, 764-65, 766, 782); repeatedly expressed his wish that petitioner had "blown his [own] face off" (R. 758-59, 774, 775, 779); asserted his own opinion as to petitioner's credibility, explaining to the jury that, were he in the defendant's position, he also would have "lie[d] until my teeth fell out" (R. 755;

see R. 748, 769, 770, 777-78); branded Darden an animal who belonged "at the other end of [a] ... leash" (R. 750) and made numerous other flagrantly inflammatory and irrelevant remarks.*

Following the summations, the jury brought in a verdict of guilty on all counts and, in the second half of the bifurcated trial, recommended imposition of a death sentence, a recommendation embraced by the trial judge.

On appeal, the Supreme Court of Florida affirmed petitioner's conviction and sentence by a five to two vote, the dissenters urging that, by reason of the prosecution's misconduct in summation, Mr. Darden was entitled to a new trial, both as a matter of state law and under the command of the Due Process Clause of the Fourteenth Amendment to the Constitution.

(b) The facts pertinent to the identification issues

As we have said, the identification testimony of Mrs. Turman and of Mr. Arnold was central to the prosecution's case. We describe below how the in-court identifications by both witnesses had been preceded by needlessly and impermissibly suggestive pretrial identifications, one of which was, in addition, conducted in the absence of petitioner's counsel. We also point out how Mrs. Turman was permitted to describe on the state's direct case her initial one-to-one identification of the defendant at a preliminary hearing.

* The full text of the prosecutors' summations are set out in Appendix B to this petition. The principal improprieties in the summations are quoted in point I of our argument (pp. 12-26, infra).

According to Mrs. Turman, she was alone in the furniture store just prior to closing time on the evening of the crime (R. 200-01). A heavy-set black man had come in ostensibly to look for used furniture for some apartments (R. 203-04). After examining a variety of furniture and appliances, the customer appeared to leave the store, only to return in a moment's time, pistol in hand, demanding the money in the cash register (R. 205-07, 244-45). Mrs. Turman testified that, as she and the robber moved toward the back of the store, her husband entered through the rear door and was shot down in his tracks as she cried out a warning (R. 207-08).

A threatened sexual assault followed but, almost immediately, Philip Arnold, who lived just a few houses away from the furniture store, pushed open the back door, saw the prostrate Mr. Turman, and squatted down to give aid to him (R. 210-13, 430-35). Within a few seconds, however, the assailant moved toward Mr. Arnold, shot him in the mouth as he looked up from his squatting position, and shot him again in the neck as he turned to flee (R. 212-13, 435-37). A third bullet struck Mr. Arnold from the rear as he ran toward his home and the gunman hastened out of the store behind him (R. 437-38).

All told, according to Mrs. Turman, she was in the presence of the robber for perhaps ten minutes, while Mr. Arnold testified that he saw the gunman for no more than twenty or twenty-five seconds, during a portion of which his attention was focused upon the body of Mr. Turman (R. 230, 245, 495-97).

Within an hour or two of the crime, Mrs. Turman described the attacker to a deputy sheriff as a heavy-set, clean-shaven black man with a fat face and of her own height -- five foot, six inches -- wearing a dark colored pullover sports shirt (R. 226-27, 237-39). When asked by the deputy whether she would be able to identify the criminal upon sight, she replied, "I would try, I would try; I might -- I don't know" (R. 239).

In contrast to this description the trial testimony showed that petitioner was five feet, ten or eleven inches tall and weighed around 170 to 175 pounds (R. 596). Moreover, one of the state's witnesses, a motorist who had stopped at the scene of the auto accident that occurred, according to the prosecution's theory, when petitioner was fleeing the scene of the crime, testified that Darden was wearing a white or greyish shirt that buttoned down the front and that he had a moustache (R. 311, 313, 318-20).

In view of these contradictions, the unfair circumstances of Mrs. Turman's pretrial identification of petitioner are particularly significant. Although, as we have noted, petitioner was arrested and charged with Mr. Turman's murder and the other crimes within a half-dozen hours of the event, the authorities did not request Mrs. Turman to identify Darden in a line-up or in any other fashion until some four days later (R. 586, 226, 216). The identification that then occurred took place during Mrs. Turman's testimony at a preliminary hearing, as petitioner sat with his counsel at the defense table -- apparently the only back man among the few people in the courtroom (R. 257-62).

Thereafter, Mrs. Turman was permitted once again to identify petitioner at his trial. To buttress this identification, the prosecution also brought out, on direct examination, the earlier identification that she had made. The prosecution questioned Mrs. Turman thus:

> "Q. Do you remember when the funeral [of Mr. Turman] was?
> A. Yes, sir, September 13th, on a Wednesday.
> Q. You say you saw Mr. Darden the day after?
> A. Yes, sir.
> Q. Where was that?
> A. At the preliminary hearing.
> Q. Did you have any trouble identifying him on that date?
> A. I did not.
> Q. And again, you're absolutely positive?
> A. Yes, sir." (R. 225-26).

In contrast to Mrs. Turman, Mr. Arnold did not tell the jury of his pretrial identification of petitioner (R. 488). Nonetheless, the credibility of his in-court idenitfication was also marred by a wantonly and needlessy suggestive photo identification not long after the crime.

On September 11, 1973 -- subsequent to the appointment of counsel for petitioner -- two sheriff's deputies visited Mr. Arnold in the hospital, where he was recovering from his bullet wounds (R. 473-75, 446). According to Mr. Arnold's testimony, elicited out of the presence of the jury, he had, by this time, already read newspaper stories about the crime which almost certainly recounted the arrest of a suspect and his identity (R. 457-59).

The deputies, Mr. Arnold recalled, had shown him six photographs and asked whether he could identify his assailant from among them (R. 447-48, 475). Four he immediately rejected out of hand, for "they didn't look anything at all like him"

(R. 449, 457). From the two remaining photographs Mr. Arnold selected that of petitioner (R. 449-50). The testimony disclosed, however, that his ability to make this choice was less than startling, for the picture of petitioner bore the name "Darden" and the date of his arrest, "9-9-73," facts of which Mr. Arnold was almost assuredly already aware (R. 453, 476-77).

Not long after this tainted identification, petitioner asked that Mr. Arnold be asked to identify him in a properly conducted lineup, but the prosecuting authorities refused the request (R. 486, 591).

(c) How the federal questions were raised and decided below

I. In connection with the selection of the jury, petitioner's counsel repeatedly excepted to the trial court's questioning of the veniremen and to its exclusion for cause of five prospective jurors on account of their conscientious scruples against the death penalty (R. 16-20, 44-46, 107, 109-10, 165). Petitioner assigned these rulings as error on appeal and the issue was extensively briefed (assignments of error 11 and 12). The Florida Supreme Court rejected this claim, sub silentio, in affirming petitioner's conviction and sentence.

II. At the preliminary hearing described earlier, petitioner's counsel strenuously objected to Mrs. Turman's testimony pursuant to the identification procedure utilized by the prosecution (R. 218-19). At trial, after hearings out of the presence of the jury concerning the state's proposed identification testimony, petitioner's attorneys objected to the court's rulings permitting such testimony (R. 214-22, 443-88).

On appeal, petitioner's counsel assigned as error the admission in evidence of the in-court identifications by Mrs. Turman and Mr. Arnold and testimony by Mrs. Turman of the preliminary hearing identification of the defendant (assignments of error 1, 2, 3, 4, 25 and 26). Although the issue was extensively briefed, the Florida Supreme Court rejected petitioner's claim without a mention in its opinion.

III. Petitioner's counsel objected to only one portion of the irrelevant and inflammatory remarks of the prosecution during summation (R. 779-80). However, this objection -- rejected out of hand by the trial court -- called into question the propriety of an entire series of the prosecutor's remarks. On appeal, petitioner assigned as error the many improprieties committed by the prosecution during summation (assignments of error 33 and 34). The issue was briefed at length and the Supreme Court of Florida rejected petitioner's claim after full discussion in its opinion.

Reasons for granting the writ

I

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE CLOSING ARGUMENTS OF THE PROSECUTION WERE SO INFLAMMATORY THAT THEY DEPRIVED PETITIONER OF A FAIR TRIAL IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

(i)

The record below presents important issues concerning the limits imposed on closing arguments by prosecutors in state court criminal jury trials by the fair trial requirement incorporated in the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The trial court, despite objection by petitioner's counsel, permitted the prosecutors* to argue persistently concerning irrelevant matters in a manner calculated to inflame the passions of the jurors and to prevent them from considering petitioner's guilt or innocence in a detached and impartial fashion. The Court should grant certiorari to consider whether the affirmance of petitioner's conviction by a divided vote of the court below was inconsistent with the principles recognized in the Court's decision in Donnelly v. DeChristoforo, 416 U.S. 637 (1974). Cf. Berger v. United States, 295 U.S. 78 (1935).

A. The State Improperly Attempted To Try Petitioner For "Offenses" Of The State Division of Corrections

Prosecutor McDaniel, the second of the state's attorneys to sum up to the jury, argued repeatedly and at

*The state divided its closing argument between two prosecutors, Mr. White and Mr. McDaniel.

length that the jurors should consider not only whether petitioner was guilty of the crimes charged in the indictment, but also should convict him of first degree murder, because the state Division of Corrections, which had allowed petitioner to leave prison on a weekend furlough, could not be trusted to keep him in prison under any other circumstance. "As far as I am concerned," McDaniel began, "there should be another Defendant in this courtroom ... and that is the division of corrections, the prisons" (R. 749). He continued:

> "As far as I am concerned ... this animal was on the public for one reason. Because the division of corrections turned him loose, lets him out, lets him out on the public. Can't we expect them to stay in a prison when they go there? Can't we expect them to stay locked up once they go there? Do we know that they're going to be out on the public with guns, drinking?" (R. 749-50)

* * *

> "I wish that person or persons responsible for him being on the public was in the doorway instead of [the murder victim]. I pray that the person responsible for it would have been in that doorway and any other person responsible for it, I wish that he had been the one shot in the mouth. I wish that he had been the one shot in the neck, instead of [Phillip Arnold, one of the state's witnesses].
>
> Yes, there is another Defendant, but I regret that I know of no charges to place upon him, except the public condemnation of them, condemn them." (R. 750-51)

* * *

> "Mr. Turman is dead because that unknown defendant we don't have in the courtroom allowed it. He is criminally negligent for allowing it." (R. 752)

* * *

> "There is one person on trial, not the Polk County Sheriff's office, not the Hillsborough Sheriff's office, but he and his keepers, the Division of Corrections." (R. 764-65)

Mr. McDaniel's last words to the jury repeated this theme: "I cannot help but wish that the Division of Corrections was sitting in the chair with him. Thank you" (R. 782).*

These comments bore no rational relationship to the question whether petitioner was guilty of the crimes with which he was charged, the only offenses for which the state had a right to try him. As a district court recently said in granting a writ of habeas corpus to a state prisoner on precisely this ground when "the state sought to try not only [the defendant] but all police corruption in Newark," Perry v. Mulligan, 399 F.Supp. 1285, 1290 (D. N.J. 1975):

> "A defendant is entitled to be tried only on those matters appearing within the four corners of the indictment. It is the responsibility of the prosecutor to refrain from appeals to passion or to prejudice, and to restrict his comments to matters within the record and legitimately in issue." 399 F.Supp. at 1289.

The trial court in the case at bar allowed the prosecution repeatedly to stray far from these limitations. It permitted the state to argue to the jury that petitioner should be punished for offenses supposedly committed by the Florida Division of Corrections -- offenses not charged in the indictment and as to which no evidence had been presented.

McDaniel engaged in closely related misconduct in urging during the guilt-determining stage of the bifurcated trial that the jury recommend imposition of the death penalty upon petitioner. The prosecutor's remarks were nothing less

*See also R. 766: "He's even got a driver's license. Why in the world does -- what in the world is a State prisoner doing with a driver's license? I wonder if the public is paying for it."

than a warning to the jury that the only way to assure that petitioner would not, before long, be free from jail was to recommend a death sentence, and that the jurors should, for that reason, find him guilty of first degree murder rather than of any of the lesser offenses upon which they were charged.

> "That's the only way that I know that he is not going to get out on the public. It's the only way I know. It's the only way I can be sure of it. It's the only way that anybody can be sure of it now, because the people that turned him loose -- this man served his time and if this man served his time as the Court has sentenced him, that's fine. If he's rehabilitated, fine. But let him go home on furloughs, weekend passes -- not home, strike that, excuse me -- go over with his girlfriend for the weekend, go shoot pool for the weekend, go sell his guns, or gun, for the weekend, go consume drink in the bars over the weekend." (R. 753-54)

This inflammatory line of argument drew the jury's attention to an issue not material to the determination of petitioner's guilt. Implicit in it was the contention that, were petitioner convicted of anything less than first degree murder and were he not put to death, he would serve only a short sentence or would be given furloughs and let "out on the public" again. Not only was this argument inflammatory and irrelevant to the issue of petitioner's guilt or innocence, but nothing in the record described the rights afforded by law or by the Florida Division of Corrections to those serving sentences for offenses other than first degree murder. The prosecution nonetheless made this a central issue in summation and asked the jury to accept its factual premise on its authority alone. Such an argument contributed nothing of legitimate concern to the jurors and could have had no effect other than to arouse their prejudices and distract them from their obligations. It thus encouraged violation of the rule that verdicts must be based upon the evidence and not upon appeals to emotion.

In Bruce v. Estelle, 483 F.2d 1031 (5th Cir. 1973), the Court of Appeals ordered the district court to grant a writ of habeas corpus because of a similar improper prosecutorial summation. The Court held an earlier state competency proceeding constitutionally defective in substantial part because of the "highly inflammatory and prejudicial comments of the state counsel's closing arguments to the jury." 483 F. 2d at 1039. Counsel had argued, incorrectly, that if the jury were to find that petitioner had been insane at the time of his trial he could not now be retried. "'If you want him walking the streets of your county, you go ahead and let him out; find him insane at the time of his trial and you will have effectively let him out of prison. That's what you are facing in your decision in this trial.'" Id. at 1040. The language of the Court of Appeals in that case is fully applicable here.

> "Such emotional, erroneous and prejudicial comments have no place in a dispassionate resolution of the question whether [petitioner] was competent in 1965 to stand trial.
>
> These comments most probably infected the whole decision-making process of the jury. State counsel knew that [petitioner] could be retried and his assertion to the jury that he could not was erroneous. Such irrelevant diatribes cannot be countenanced." Ibid.

B. The State Sought To Prejudice the Jurors By Appealing Improperly To Their Emotions

McDaniel's repeated expression during summation of the wish that petitioner had been maimed or killed further contributed to the denial of Darden's constitutional right to a fair trial. The prosecutor repeatedly made comments like the following:

> "I wish [Mr. Turman] had had a shotgun in his hand when he walked in the back door and blown his face off. I wish that I could see him [petitioner] sitting here with no face, blown away by a shotgun, but he didn't.... I wish someone had walked in the back door and blown his head off at that point." (R. 758-59)

McDaniel returned to this theme when he described the five times that the murder weapon had been fired. He explained that this left one bullet in the chamber. "[Darden] didn't get a chance to use it. I wish he had used it on himself" (R. 774; see also R. 775). He made a similar comment when he described petitioner's automobile accident: "I wish he had been killed in the accident, but he wasn't. Again, we are unlucky that time" (R. 775). Finally, while discussing the claim that petitioner had changed his appearance between the date of the crime and that of the trial, McDaniel gratuitously commented that "[t]he only thing he hasn't done that I know of is cut his throat" (R. 779).

It should require no citation to authority to establish that the repetition of this theme grossly exceeded the limits of permissible argument. The quoted statements were nothing more than a calculated attempt by the prosecution to transmit its hatred of petitioner to the jurors and to make that hatred a factor in their decision-making. See United States ex rel. Haynes v. McKendrick, 481 F.2d 152 (2nd Cir. 1973). Compare Kelly v. Stone, 514 F.2d 18, 19 (9th Cir. 1975) (reversing a denial of habeas corpus relief, inter alia, on the basis of the following portion of a district attorney's closing argument: "'Because maybe the next time it won't be a little black girl from the other side of the tracks; maybe it will be somebody that you know; maybe it will be somebody that I know. And maybe the next time he'll use the knife'").

C. The State Improperly Placed The Prosecutors' Personal Credibility In Issue

Both prosecutors also engaged in blatantly improper argument by placing in issue their own credibility and that of their office. Mr. White, who spoke first, was responsible for the most flagrant example of this. He concluded his argument to the jury with the following words:

> "I am convinced, as convinced as I know I am standing before you today, that Willie Jasper Darden is a murderer, that he murdered Mr. Turman, that he robbed Mrs. Turman, and that he shot to kill Phillip Arnold. I will be convinced of that the rest of my life." (R. 748)

This statement was, of course, improper. Compare Kelly v. Stone, supra, where the court characterized as "a highly improper expression of personal opinion" the following, less explicit comment: "'If you can't find the defendant guilty on the facts that I have presented to you, I feel like I just might as well, you know, close up shop and go home ... .'" 514 F.2d at 19. Were this the only instance of prosecutorial misconduct, however, and had it promptly been corrected by the trial judge, perhaps petitioner's right to a fair trial might not have been imperiled. E.g., Sanchez v. Heggie, 531 F.2d 964 (10th Cir. 1976); Young v. Anderson, 513 F.2d 1969 (10th Cir. 1975). But as we have already shown, this comment was neither the only sort of wrongdoing by the prosecutors in the course of summation nor was it even the only instance in which the prosecutors added the weight of their own opinions to the trial testimony.

Mr. McDaniel, for example, repeatedly offered the jury his opinion that petitioner was not a man worthy of belief.

Since petitioner's defense consisted largely of his own alibi testimony, the prejudice from such remarks is manifest. McDaniel's remarks included the following:

a. Petitioner testified that he had asked for a lie detector test. In disussing that testimony McDaniel said: "I don't believe anything he says ..." (R. 770).

b. Petitioner testified that his alibi was the truth. McDaniel attacked this testimony in the following way: "Well, let me tell you something: if I am ever over in that chair over there, facing life or death, life imprisonment or death, I guarantee you I will lie until my teeth fall out" (R. 755).

c. Petitioner testified that he remembered the precise times of several events that occurred during the day of the murder. These statements were a crucial part of his testimony for, if true, they established that he could not have been in the Turman furniture store at the time of the crime. McDaniel's response: "I couldn't even tell you right now what day I put a witness on the stand this week. If I thought about it, maybe I could remember ..." (R. 769).

d. Petitioner testified that he stopped at a service station after his automobile accident, seeking assistance. McDaniel recounted that testimony and said: "That's what he says. I don't know that he stopped at any.... I guarantee you he was not going back to the scene of the accident until he had gotten home" (R. 777-78).

e. In addition to telling the jury that he thought petitioner a liar, McDaniel also suggested in a thinly veiled way that he knew of other instances where petitioner had shot people: "Darden doesn't like people who move after he shoots them in the mouth" (R. 761). The prosecutor, in the mind of the jury, is in a position to know if defendant has a history of violent crime, cf. Donnelly v. DeChristoforo, supra, 416 U.S. at 642, and the suggestion that he does have such knowledge is clearly inconsistent with a defendant's right to be tried only on the admissible evidence actually presented. Bowers v. Coiner, 309 F.Supp. 1064, 1071-72 (S.D. W.Va. 1970) (prosecutor discussed a gun that had not been admitted in evidence).

2. McDaniel's Summation Also Included Other Forms of Improper Argument

McDaniel's closing argument also contained numerous other instances of improper argument which, perhaps taken alone and surely when taken together with those already discussed, nullified petitioner's right to a fair trial. Some of McDaniel's comments, for example, tended to interfere with petitioner's right to the effective assistance of counsel by commenting in a deprecatory way on his exercise of that right. Indeed, McDaniel began his argument by telling the jury in effect that it should pay no attention to the argument of defense counsel that would follow because all defense lawyers always made the same arguments:

> "Now [defense counsel] and I am positive, and I assure you and I guarantee you that [defense counsel] will try the Polk County Sheriff's Office; he will try the Polk County Sheriff's Office; and he will try me. And he will try Mr. White. I guarantee that, because he has notes I gave him many years ago." (R. 749).

The inarticulate premise was, of course, that all defendants are guilty.

McDaniel committed a similar error when he discussed petitioner's statement that he would take a lie detector test if his attorney were present. McDaniel said:

> "Well, only an incompetert lawyer would allow Darden to take a lie detector test. And that prisoner, with those convictions on his record, knows that." (R. 770).

In a like vein, McDaniel attempted to shift the state's burden of proof to the defense. When defense counsel Maloney objected to McDaniel's repeated articulation of the wish that petitioner had been killed, he asked the Court to instruct McDaniel "to stick with what little evidence he has" (R. 779). McDaniel answered: "You don't have any evidence ycurself, Mr. Maloney" (R. 780). The trial court, instead of reprimanding McDaniel and instructing the jury to ignore the remark, merely said "All right, gentlemen. Proceed with your argument. Objection will be overruled. Go ahead, sir" (R. 780).

Finally, throughout his argument McDaniel repeatedly referred to aspects of petitioner's conduct while on weekend furlough from prison that were entirely unrelated to the offenses with which he was charged. Suggestive references to petitioner's relationship with his girlfriend and other comments of like character could have had no other effect than to imply to the jury that petitioner was a "bad man" and therefore probably committed the offenses charged in the indictment. Cf. Manning v. Jarnigan, 501 F.2d 408, 412 (6th Cir. 1974).

As the foregoing excerpts show, the decision of the court below was manifestly inconsistent with Donnelly v. DeChristoforo, supra. There the Court set forth the criteria to be employed in determining whether improper agrument by a prosecutor amounts to a deprivation of the right to a fair trial and entitles a defendant to a reversal of his conviction. The factors identified in DeChristoforo include the following: 1) the length and frequency of the prejudicial statements in proportion to the total length of the summation and their likely impact on the jury; 2) whether the statements were intentional and, if so, whether they were provoked by remarks of defense counsel; and 3) whether the trial judge promptly took appropriate corrective steps and, if so, the likely effectiveness of those steps.

In DeChristoforo the court found that the remarks challenged, though improper, had not deprived DeChristoforo of a fair trial. The statements at issue were only "a few brief sentences in the prosecutor's long ... closing argument which might or might not suggest to a jury that the respondent had unsuccessfully sought to bargain for a lesser charge." 416 U.S. at 647.

In the case at bar, in contrast, the record shows clearly that the prosecutor's improper remarks were neither isolated nor ambiguous. McDaniel's inflammatory and irrelevant comments took up more of his closing argument than did his consideration of the evidence. McDaniel did not merely suggest, inadvertently and ambiguously, that he knew petitioner had admitted his guilt. Instead, he attempted, intentionally

and repeatedly, to poison the atmosphere of the trial and deprive petitioner of his right to an objective, impartial jury.

In DeChristoforo this Court concluded that the prosecutor's misconduct was not intentional, principally because the challenged remark was isolated and ambiguous and could easily have slipped out in the heat of argument. "[A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." 416 U.S. at 647.

McDaniel's remarks, in contrast, could only have been intentional, his lip service to the canons of ethics notwithstanding (R. 752). He repeated the improper themes over and over again. There can likewise be no doubt that the jury understood the prosecutor's meaning -- his remarks could only have been taken as encouragement to reach a decision on petitioner's guilt based on conduct of the Division of Corrections and in an atmosphere charged with hatred.* Moreover, the record is clear that the defense attorneys did nothing that might have "provoked" the prosecutors. Indeed, we submit that nothing they could have said would ever excuse conduct like that of the prosecution during summation in the case at bar.

In DeChristoforo the prosecutor's remark, "ambiguous" and "but one moment in an extended trial," "was

*Compare the famous dictum of Mr. Justice Frankfurter, dissenting in Sacher v. United States, 343 U.S. 1, 38 (1952): "A criminal trial, it has well been said, should have the atmosphere of the operating room."

followed by specific disapproving instructions." 416 U.S. at 645. The trial court in the case at bar, instead of admonishing the jury that the prosecutor's remarks were improper and directing the jury to ignore them, overruled petitioner's objection without comment (R. 779-80).* Instead of correcting the prosecutor's misconduct, the Court allowed the jury to believe McDaniel's argument was proper and worthy of consideration.

The prejudicial effect of this ruling was especially important in a trial like petitioner's, since the evidence of guilt was far from overwhelming. Moreover, even if the court had sustained petitioner's objection, reprimanded the prosecutor and instructed the jury to disregard the improper portions of his argument -- or even if the Court's general instructions on the role of argument were read as addressing this question (R.713-14, 863-64) -- we submit that petitioner would still be entitled to a reversal of his conviction. Donnelly v. DeChristoforo, supra, 416 U.S. at 644. Compare Kelly v. Stone, 514 F.2d 18, 19 (9th Cir. 1975). In the absence of any simultaneous attempt at correction by the court, the impact on the jury must be presumed substantial. Cf. Chapman v. California, 386 U.S. 18 (1967).

Significantly, even the majority opinion in the court below acknowledged that McDaniel's arguments were improper and observed that the "language used by the prosecutor would have possibly been reversible error if it had been used regarding a less heinous set of crimes." Darden v. State, 329 So. 2d 287, 290 (Fla. 1976). Turning logic on its head, the court concluded, however, that in light of the nature of the crime McDaniel's repeated improprieties were "fair comment" on the evidence. Ibid.

Even if the remarks had been comments on the evidence the court below would have been wrong -- the due process clause demands more, not less, when life is at stake than it does when the severest available penalty is incarceration for a term of years. E.g., Reid v. Covert, 354 U.S. 1, 65 (1957) (Harlan, J., concurring); Powell v. Alabama, 287 U.S. 45, 71 (1932). But here most of McDaniel's comments had nothing to do with the evidence; they were inflammatory rhetoric that did not tend to make more or less likely any fact in issue at the trial.

(iii)

The impartiality of the jury in a criminal case is fundamental to due process of law. E.g., Turner v. Louisiana, 379 U.S. 466 (1965). A defendant is entitled to an impartial, "indifferent" jury, "regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies." Irvin v. Dowd, 366

*We recognize, of course, that petitioner's trial counsel objected only once to the many improper remarks in the course of McDaniel's summation. However, both the majority and dissenting opinions in the Florida Supreme Court considered the propriety of the summation on the merits and at length and such consideration is sufficient to permit this Court to grant certiorari and pass on the issue. E.g., Boykin v. Alabama, 395 U.S. 238 (1969); Coleman v. Alabama, 377 U.S. 129 (1964); Whitney v. California, 274 U.S. 357 (1927).

Moreover, notwithstanding its afterthought reference to State v. Jones, 204 So. 2d 515 (Fla. 1967), consideration of the merits by the court below was consistent with usual Florida practice. E.g., Wilson v. State, 294 So. 2d 327, 329 (Fla. 1974) ("Such absence [of objection] will not suffice [to bar appellate review] where the comments or repeated references are so prejudicial to the defendant that neither rebuke nor retraction may entirely destroy their influence in attaining a fair trial."); Grant v. State, 194 So. 2d 612 (Fla. 1967); Cooper v. Wainwright, 308 So. 2d 182, 185 (Fla. Ct. App. 1975).

U.S. 717, 722 (1961). See also, Chambers v. Mississippi, 410 U.S. 284 (1973); Sheppard v. Maxwell, 384 U.S. 333 (1966). The prosecution's actions in the case at bar destroyed the atmosphere necessary for the jury to conduct its deliberations fairly and impartially, cf. Estes v. Texas, 381 U.S. 532, 540 (1965), and deprived petitioner of that right.

Although this Court has directly addressed the issue of state prosecutorial misconduct during closing argument only in DeChristoforo, the problem is a frequently recurring one in both state and -- upon habeas corpus -- in federal courts. See, e.g., Sanchez v. Heggie, 531 F.2d 964 (10th Cir. 1976); Kelly v. Stone, 514 F.2d 18 (9th Cir. 1975); Manning v. Garnigan, 301 F.2d 408 (6th Cir. 1974); Bruce v. Estelle, 483 F.2d 1031 (5th Cir. 1963); United States ex rel. Haynes v. McKendrick, 481 F.2d 152 (2d Cir. 1973); Perry v. Mulligan, 399 F.Supp. 1285 (D. N.J. 1975). Further guidance from this Court concerning the application of the fair trial requirement to prosecutorial summation is, therefore, warranted both to assist lower courts in their review of state convictions and to assist prosecutors in shaping their conduct to proper constitutional limitations.

For all of the foregoing reasons, the Court should grant certiorari and reverse.

II

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER EITHER THE ADMISSION IN EVIDENCE OF A WANTONLY AND NEEDLESSLY SUGGESTIVE PRETRIAL INDENTIFICATION OR OF TWO IN-COURT IDENTIFICATIONS OF PETITIONER SUBSEQUENT TO IMPERMISSIBLY SUGGESTIVE PRETRIAL IDENTIFICATIONS DEPRIVED HIM OF DUE PROCESS OF LAW.

(i)

The record below presents an important constitutional question concerning the standards applicable in passing on the admissibility in a state court criminal trial of testimony of an impermissibly suggestive pretrial identification. In the present case the trial court permitted Mrs. Turman, a witness to her husband's murder, to testify during the prosecution's direct case that she had identified petitioner at a preliminary hearing some five days after the crime. Indisputably, this testimony was important to the prosecution, for it tended to validate Mrs. Turman's in-court identification of the defendant and, as we have said, the identification of petitioner was the linchpin of the state's case.

We show below that the circumstances of the identification of petitioner at the preliminary hearing were "unnecessarily suggestive and conducive to irreparable mistaken identification." Stovall v. Denno, 388 U.S. 293, 302 (1967). Thus, the record here presents an issue identical to that presently pending before the Court in Brathwaite v. Manson, 527 F. 2d 363 (2d Cir. 1975), cert. granted, 48 L. Ed. 2d 202 (May 3, 1976, No. 75-871). That question is whether a conviction secured in part through testimony of a wantonly and unnecessarily suggestive pretrial identification is, without more, subject to reversal, if both the identification and trial post-dated Stovall v. Denno, supra.

Prior to the Court's decision in Neil v. Biggers, 409 U.S. 188 (1972), there was little reason to doubt that "except in cases of harmless error, a conviction secured as the result of admitting an identification obtained by impermissibly suggestive and unnecessary measures could not stand." Brathwaite v. Manson, supra, 527 F.2d at 367. See, e.g., United States v. Fernandez, 456 F.2d 638, 641-42 (2d Cir. 1972); Kimbrough v. Cox, 444 F.2d 8 (4th Cir. 1971); United States v. Fowler, 439 F.2d 133 (9th Cir. 1971); Mason v. United States, 414 F.2d 1176 (D.C. Cir. 1969). If this be the rule today, reversal of petitioner's conviction is clearly required.

Mr. Justice Powell's opinion in Biggers created doubt about the appropriate standard to be applied on these facts by emphasizing that it is "the likelihood of misidentification which violates a defendant's right to due process." 409 U.S. at 198. "[T]he primary evil to be avoided is 'a very substantial likelihood of irreparable misidentification.'" Ibid. (quoting from Simmons v. United States, 390 U.S. 377, 384 (1968)). As Judge Friendly wrote in Brathwaite v. Manson, supra:

> "If this [passage] stood alone, it would strongly support a conclusion that the Court intended the 'very substantial likelihood of misidentification' test to apply to show-up or photographic identifications that were impermissibly and unnecessarily suggestive as well as to later out-of-court or in-court identifications." 527 F.2d at 368 (footnote omitted).

Mr. Justice Powell also observed, however, that it was unclear from the pre-Biggers opinions of the Court whether the Stovall standard is to be applied, thus requiring exclusion of identification testimony once a defendant has demonstrated

unnecessary suggestiveness conducive to misidentification, or whether the state may invoke the less stringent Simmons rule and require the defendant to demonstrate the likelihood of irreparable misidentification. 409 U.S. at 198-99. Justice Powell resolved the problem in Biggers by noting that the justification for a per se rule of exclusion is deterrence of improper police and prosecution procedures, a goal which could not be served on the facts of the Biggers case because the challenged identification preceded the Stovall decision. Biggers therefore left open the question of the proper standard to be applied in cases like the one at bar, where both the identification and the trial occurred after the decision in Stovall.

The Courts of Appeal are in conflict on this important question. The Second, Fourth and Eighth Circuits have decided this issue in petitioner's favor.* The Fifth and Sixth Circuits appear to have adopted the same rule.** The Seventh Circuit seems to have ruled the other way.***

If the Court should decide against petitioner on the foregoing issue, the record here nonetheless presents a further question: whether, on the facts, the circumstances of Mrs. Turman's preliminary-hearing identification of petitioner

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* Brathwaite v. Manson, 527 F.2d 363 (2d Cir. 1975), cert. granted, 48 L.Ed.2d 202 (May 3, 1976, No. 75-871); Smith v. Coiner, 473 F.2d 877, 880-81 (4th Cir.), cert. den. sub nom. Wallace v. Smith, 414 U.S. 1115 (1973); Sanchell v. Parratt, 530 F.2d 286, 294 (8th Cir. 1976).

** Rudd v. Florida, 477 F.2d 805, 809 (5th Cir. 1973); Workman v. Cardwell, 471 F.2d 909, 910 (6th Cir. 1972), cert. denied, 412 U.S. 932 (1973).

*** United States ex rel. Kirby v. Sturges, 510 F.2d 397 (7th Cir.) (per Stevens, J.), cert. denied, 421 U.S. 1016, (1975) (Douglas, J., dissenting).

created "a very substantial likelihood of irreparable misidentification" requiring a reversal under Simmons v. United States, supra, 390 U.S. at 384.

A. The Biggers problem in the case at bar arises from the way in which the state conducted Mrs. Turman's initial identification of petitioner. Mr. Turman was killed on September 8, 1973. Five days later, on September 13, 1973, a preliminary hearing was held; Mrs. Turman was the only witness. Petitioner, who was seated with his attorney at the defense table, was apparently the only black person in the courtroom, and certainly the only black person at the counsel table (R. 257-62).* After a few preliminary questions by the prosecutor, the court interrupted and the following colloquy took place:

"THE COURT: Ask her to identify.
MR. MARS [the prosecutor]: Yes, sir.
Q: Can you see this man sitting here?
MR. HILL [the public defender]: Your Honor, I am going to object to that type of identification.
THE COURT: I am not. Sit down.
MR. HILL: Judge --
THE COURT: Not under these circumstances, Mr. Hill.
MR. HILL: Judge, even as a defense attorney, that shows no respect in court, much less for the Court, and I ----
THE COURT: I appreciate ----
MR. HILL: And the objection, I want on the record.
THE COURT: I appreciate that. It's on the record. This woman has had a traumatic experience and she ----
MR. HILL: Judge, I appreciate that. I still have an obligation to my client.
THE COURT: I appreciate that. Now, if you want to be held in contempt, you pardon me. Alright, go ahead.

* At trial the court denied a motion to suppress, accepting for purposes of deciding the motion that petitioner had been the only black in the room at the time of the identification (R. 222).

Q: Is this the man that shot your husband?
A: Yes, sir." (R. 49-50)

Plainly, the procedures followed at the preliminary hearing were "impermissibly suggestive" within the meaning of Stovall. As the Court there said,

> "[t]he practice of showing suspects singly to persons for the purpose of identification, and not as a part of a lineup, has been widely condemned." 388 U.S. at 302 (footnote omitted).

Cf. Foster v. California, 394 U.S. 440, 443 (1969). Indeed, the exhibition of a single suspect to a witness is "the most suggestive and, therefore, the most objectionable method of pretrial identification." United States v. Dailey, 524 F.2d 911, 914 (8th Cir. 1975). The inherent defect in such a procedure is, of course, that the state in effect has said to the witness: "We have captured the criminal. Here he is. Don't you agree?" Compare Foster v. California, supra, 394 U.S. at 443 ("In effect, the police repeatedly said to the witness, 'This is the man'") (emphasis in original).

In the case at bar, the inherent suggestiveness of the state's tactic was aggravated by the Court's pointed introduction to the procedure ("Ask her to identify"), which demonstrated to Mrs. Turman, if she did not already know, that she was expected to identify petitioner, and by the prosecutor's leading questions ("Can you see this man sitting here?"; "Is this the man that shot your husband?").* Even Mrs. Turman, on

* The state's choice of the preliminary hearing, a step in the process of charging petitioner with the murder of her husband, as the forum for Mrs. Turman's confrontation with the suspect should itself have been sufficient to call Mrs. Turman's attention to the expectation of everyone in the courtroom that she would identify petitioner. Cf. Sanchell v. Parratt, supra, 530 F.2d at 294.

cross-examination at trial, acknowledged that the prosecutor's questions directed her attention to petitioner:

> "Q: But he did in some way through the record of what was asked in the answers that were given indicate this man here?
> A: I would say yes.
> * * *
> Q: Mrs. Turman, just a couple of questions. At that preliminary hearing that Mr. McDaniel and I both have been talking about, in your mind was there any question who Mr. Mars was referring to when he asked the question, 'Is that the man that killed your husband?'
> A: No, there was no doubt in my mind.
> Q: As to who he was referring to?
> A: Right." (R. 262, 265).

It is clear, also, that the suggestiveness of the procedure was wholly unnecessary. Petitioner was taken into custody within a few hours of the crime, and there was surely ample opportunity between his arrest and the day of the preliminary hearing to conduct a lineup consistent with petitioner's constitutional rights. Certainly, the state has come forward with no suggestion of a reason for its failure to do so. Compare Smith v. Coiner, 473 F.2d 877, 881 (4th Cir.), cert. denied sub nom. Wallace v. Smith, 414 U.S. 1115 (1973).

We submit that, in view of these facts, the Court should grant certiorari and hear and decide this case in conjunction with Manson v. Brathwaite, supra.

B. If the Court concludes that Neil v. Biggers, supra, requires the application of the more lenient Simmons test to testimony concerning a post-Stovall identification, the Court should nevertheless grant certiorari, for the record presents the question whether, even absent a per se rule, Mrs. Turman's pretrial confrontation with defendant was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Simmons v. United States, supra, 390 U.S. at 384.

In section A of this point we described the respects in which Mrs. Turman's pretrial confrontation with petitioner was impermissibly and unnecessarily suggestive. In Neil v. Biggers, supra, the Court described the factors to be examined in determining whether such an identification "give[s] rise to a very substantial likelihood of irreparable misidentification," Simmons v. United States, 390 U.S. 377, 384 (1968):

> "As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." Neil v. Biggers, supra, 409 U.S. at 199-200.

See Simmons v. United States, supra, 390 U.S. at 382-86. Applying the Biggers standard to the facts of the case at bar presents the substantial question whether the court below erred in finding that the circumstances of the preliminary hearing were so impermissibly suggestive as to require the exclusion at trial of testimony as to this identification. If such a finding were appropriate, then the at-trial identification of petitioner would itself, of course, also have to be excluded from evidence.

The first factor identified in Biggers was the witness' opportunity to observe. In the case at bar Mrs. Turman testified that her husband's murderer was in her presence for approximately ten minutes. The more significant question, however, is what she did with the opportunity or, as the Court phrased it in Biggers, her "degree of attention."

We know from Mrs. Turman's testimony that once the robber pointed a gun at her she was too frightened to look at him or to know what was happening, and that at one point she even covered her face with her hands and began to pray (R. 249). The record also suggests that Mrs. Turman did not pay close attention before the gun appeared. At trial she did not remember, for example, whether the robber walked around the store in front of her or behind her or, indeed, whether or not she accompanied him for part of his walk (R. 234-35). When she was asked questions about what acts not connected to the crime the robber performed while in the store, she could not remember (R. 235).

A third factor -- the inaccuracy of Mrs. Turman's prior identification -- is closely related to the first two questions. We have already described how Mrs. Turman's initial description of her husband's murderer deviated markedly from petitioner's actual appearance at the time of his automobile accident (supra, p. 8). In addition to answering directly the question posed in Biggers, this initial description suggests that, despite the opportunity that she may have had to observe the murderer, Mrs. Turman did not pay close attention to him.

In the face of these circumstances, Mrs. Turman's testimony that she was certain of the accuracy of her identification simply cannot be credited. Moreover, the state in the case at bar utterly failed to meet its burden of establishing

> "that the subsequent identification was secured by fair procedures insulating it from the prior suggestion. It must show that the factors mentioned in Biggers, including 'the level of certainty demonstrated by the witness at the [time of the] confrontation' indicate an independent and reliable identification." Sanchell v. Parratt, 530 F.2d 286, 296 (8th Cir. 1976) (citation and footnote omitted).

The state instead elicited the following testimony fr Mrs. Turman with respect to the pretrial identification:

> "Q: Did you have any trouble identifying him on that date?
> A: I did not.
> Q: And again, you're absolutely positive?
> A: Yes, sir." (R. 226)

The record demonstrates that the pretrial hearing during which Mrs. Turman identified petitioner was conducted in an atmosphere conducive to irreparable misidentification and that misidentification was, in fact, likely. The record contains none of the indicia of reliability that the Court stressed in Biggers where, for example, the witness had established a history of reliability by resisting the opportunity to identify persons other than the defendant in properly conducted lineups. 409 U.S. at 201. Finally, the record here reveals no circumstances justifying failure to adhere to a consitutionally permissible idenitifcation procedure.

(ii)

The record below also presents a substantial constitutional question arising from the identification of petitioner at trial by the witness Phillip Arnold.

Arnold, as we have described, while still in the hospital recovering from his bullet wounds, selected a photograph of petitioner from among six shown him by sheriff's deputies. He was not permitted to testify to that pretrial identification at the trial, but was allowed to tell the jury that he recognized petitioner as his assailant. The evidence is substantial that this in-court identification had its genesis in the impermissibly suggestive photo spread.

As we have said, when Mr. Arnold was shown the group of six photographs in the hospital, he immediately rejected four of them because "they didn't look anything at all like him [petitioner]" (R. 457). Of the two remaining, he chose the picture of petitioner, so he explained, because the other was "also younger and wasn't as big" (R. 464). Surely however, the burden of his task was substantially mitigated by the presence on petitioner's photo of his name and the date of his arrest, for Mr. Arnold testified out of the hearing of the jury that he had, by the time of the photo lineup, already read newspaper stories about the crime and the arrest that had occurred (R. 453, 457-59, 476-77).*

In Simmons, this Court explained the dangers of suggestive photographic identifications.

> "It must be recognized that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals. A witness may have obtained only a brief glimpse of a criminal, or may have seen him under poor conditions. ... This danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw, or if they show him the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized. The chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime. Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification." 390 U.S. at 383-84 (emphasis supplied).

* The testimony of deputy sheriff Neil is also significant. He testified, first, that Arnold identified the photograph in writing by copying the arrest date (R. 476), and second, that only one or two photographs other than petitioner's had a name on it (R. 477).

The fears the Court expressed in Simmons describe precisely what happened in the case at bar. Arnold had only a brief opportunity -- 20 to 25 seconds by his own testimony -- to observe his assailant, and for much of that time his attention was focused on the prostrate Mr. Turman. Arnold also testified that his mind "went blank" for some period after he saw the gun (R. 436, 500). We have already shown that of the two photographs that petitioner did not immediately eliminate the police had emphasized one of them -- petitioner's.

These facts all point to the conclusion that Arnold's at-trial identification of petitioner was the result of the suggestive conditions of the pretrial photographic identification. Moreover, just as the state need not have had Mrs. Turman identify petitioner in a suggestive context, it also need not have done so with Arnold. The state had already settled on petitioner as the murderer of Mr. Turman and was pursuing no other leads. The prosecutors could have taken more time, if more time was necessary, to gather other photographs of persons bearing a resemblance to petitioner, and they could also easily have waited until Arnold was released from the hospital and then held a properly conducted line-up.

The state's attempt to demonstrate that Arnold's trial identification of petitioner was independent of and not tainted by the display of photographs he had seen falls far short of the requirements established by this Court. As the following excerpt from Mr. Arnold's direct examination demonstrates, the prosecutor led him through a series of pro forma statements that created only the appearance of compliance with the law:

"Q: All right, Mr. Arnold, I want you to look at this man and tell me whether or not you can identify him from the time you saw him when he blasted you in the face. Can you, think back to September 8th, 1973, forget everything else, forget the hospital, forget everything, September 8th, and right now?
A: Yes, sir, that's him.
Q: Do you have any doubt whatsoever in your mind?
A: No, sir, none.
Q: Did the photographs -- are you remembering the photographs?
A: No.
Q: What are you remembering?
A: The day I was shot.
Q: Are the photographs helping you in any way?
A: No, sir.
Q: Whatsoever to identify him?
A: No, sir.
Q: None whatsoever in your mind?
A: None." (R. 466-67)

Given the way in which the photo spread was conducted, more must be required of the state than the ritualistic testimony of the witness, in response to leading questions, as to what he remembered. Without some such showing of independent memory,

> "it becomes simply a matter of judicial rhetoric to say that the earlier denial of due process is no longer influential in the witness' ultimate identification. Due process, under these circumstances, and the test of substantial likelihood of irreparable misidentification are more than mere subjective tools of the judge viewing the facts. Such tests necessarily must lend themselves to objective evaluation and the assurance necessary to overcome the pervasive dangers of misidentification." Sanchell v. Parratt, supra, 530 F.2d at 296-97.

The state in the case at bar did not offer objectively verifiable proof that Arnold's identification was adequately insulated from the suggestive display of photographs, and the record therefore presents the question of the extent of the showing the state must make to discharge its burden.

The record of petitioner's trial presents substantial questions concerning the correctness of the decisions of the courts below to permit the identification testimony of both Mrs. Turman and Mr. Arnold. The Court should grant certiorari to consider whether those decisions comply with the constitutional requirements set forth by this Court in earlier cases.

III

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE EXCLUSION FOR CAUSE OF FIVE VENIREMEN BECAUSE OF THEIR EXPRESSED ATTITUDES TOWARD THE DEATH PENALTY VIOLATED PETITIONER'S RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION

The record below presents important issues concerning the constitutionality of excluding persons who express general opposition to capital punishment from service on juries at both the guilt-determining and penalty-determining phases of trials conducted under a bifurcated procedure.

Pursuant to Fla. Stat. Ann. §921.141(3) (1974-1975 supp.), the sentence in capital cases in Florida is recommended by a majority of the jury, and the trial judge is empowered to overrule this recommendation and to enter a sentence of either death or life imprisonment. Although advisory, the jury's recommendation remains highly important to a convicted capital defendant,* for the Florida Supreme Court has said that:

> "[b]oth the trial judge, before imposing a sentence, and this Court, when reviewing the propriety of the death sentence, consider as a factor the advisory opinion of the sentencing jury. In some instances it could be a critical factor in determining whether or not the death penalty should be imposed."

LaMadline v. State, 303 So.2d 17, 20 (Fla. 1974). See also Taylor v. State, 294 So.2d 648 (Fla. 1974). Nevertheless, in the present case the Florida Supreme Court rejected without

*The decision of this Court in Witherspoon v. Illinois, 391 U.S. 510 (1968), was expressly made applicable to procedures under which juries "impose or recommend" the death penalty. Id. at 522.

comment petitioner's claim that the exclusion of five veniremen from his trial jury on account of scruples against the death penalty violated the constitutional requirements of Witherspoon v. Illinois, 391 U.S. 510 (1968).

A. The Test of Exclusion Applied by the Court Below Did Not Meet the Minimum Standards Required by the Constitution, as Construed in Witherspoon v. Illinois.

The trial court excluded five prospective jurors for cause on the basis of their expressed convictions concerning the death penalty (R. 44-46, 107, 109-10, 165). Petitioner submits that at least two of these exclusions were patently erroneous under Witherspoon.

Venireman Varney was exluded after the following colloquy:

> "[D]o you hold such conscientious moral or religious principles in opposition to the death penalty you would be unwilling under any circumstances to recommend the death sentence?
>
> * * *
>
> "MR. VARNEY: Yes, sir.
>
> THE COURT: You feel then, sir, that even though and I am not saying it will it would [sic] be purely speculative, in the event that the evidence should be such that under the law that should be the legal recommendation you would be unwilling to return such a recommendation because of your conscientious beliefs?
>
> MR. VARNEY: I believe I would.
>
> THE COURT: All right, sir. You will be excused." (R. 44-45).

Venireman Murphy was excluded on the basis of an even more perfunctory exchange:

"THE COURT: Do you have any moral or religious, conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts?

MR. MURPHY: Yes, I have.

THE COURT: All right, sir, you will be excused then." (R. 165)

Witherspoon prohibits the exclusion of veniremen for cause on account of conscientious or religious scruples against the death penalty* except under narrow and carefully defined circumstances. Such exclusions are constitutionally permissible only if veniremen make "unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." Witherspoon v. Illinois, supra, 391 U.S. at 522 n.21 (emphasis in original). See also, Maxwell v. Bishop, 398 U.S. 262, 266 (1970); Boulden v. Holman, 394 U.S. 478, 482 (1969); Mathis v. New Jersey, and companion cases, 403 U.S. 946-48 (1971); Marion v. Beto, 434 F.2d 29, 32 (5th Cir. 1970).

Mr. Varney's responses to the court's questions concerning the extent and effect of his views on capital punishment fell far short of the Witherspoon requirements.

*"[A] sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." Witherspoon v. Illinois, supra, 391 U.S. at 522 (footnote omitted).

He said only that "I believe I would" be unwilling to return a recommendation that the death penalty be inflicted. This response hardly demonstrated "unambiguously," 391 U.S. at 516 n.9, or "unmistakably," 391 U.S. at 522 n.21, that Mr. Varney would "automatically" have voted against the imposition of the death penalty and did not even begin to suggest that his views on capital punishment would have prevented him from making an impartial decision as to petitioner's guilt. He expressed only a tentative belief that he would be unwilling to return a death sentence, a position that is far less certain than Witherspoon requires for exclusion. Moreover, he expressed no judgment whatever concerning the impact of his attitude toward capital punishment on his consideration of the evidence of petitioner's guilt; indeed, the court failed to inquire of him on this subject. This silence was especially important in the case at bar, since the court did not explain to Mr. Varney either his responsibilities as a juror to obey the court's instructions on the law or the meaning of the relevant concept of "impartiality."

Mr. Murphy's response to the court's questioning was equally uninformative. His response established no more than that a vote to recommend the death penalty would violate certain abstract principles. Without explaining its reasoning, the trial court inferred from this that, regardless of what the evidence showed, Mr. Murphy would never vote except in accordance with his principles. Seemingly, the court did not conclude that either Mr. Varney or Mr. Murphy would be unable to sit impartially on the question of guilt or innocence.

The responses of these veniremen are indistinguishable in substance from similar expressions of sentiment by jurors whose exclusion for cause this Court has heretofore found erroneous. See Witherspoon v. Illinois, supra, 391 U.S. at 515. For example, in Maxwell v. Bishop, 398 U.S. 262, 265 (1970) (emphasis omitted), the following colloquy took place:

> "Q. Mr. Adams, do you have any feeling concerning capital punishment that would prevent you or make you have any feelings about returning a death sentence if you felt beyond a reasonable doubt that the defendant was guilty and that his crime was so bad as to merit the death sentence?
>
> A. No, I don't believe in capital punishment."

See also, Boulden v. Holman, 394 U.S. 478, 483-84 (1969). The law is clear. Although "a mere reluctance ... or an abstract belief against capital punishment is not sufficient grounds for challenging a juror for cause," Smith v. Whisman, 431 F.2d 1051, 1052 (5th Cir. 1970), both Mr. Varney and Mr. Murphy were excused upon nothing more.

The trial court's questioning was, indeed, calculated to confuse the prospective jurors as to their duty under the new Florida statute. Although they were instructed they they would have the dual role of considering guilt and sentence separately, they were not asked whether their scruples would interfere with the determination of petitioner's guilt under a procedure in which a guilty verdict does not necessarily entail the death sentence. They were not advised during voir dire of the wide range of mitigating circumstances that jurors would be entitled to recognize in making a recommendation against death. See Fla. Stat. Ann. §921.141(7) (1974-1975 supp.). Had

they been properly instructed, the Court might well have found that their scruples did not disqualify them from sitting on the jury.

The exclusion of Mr. Murphy and Mr. Varney also presents the frequently recurring question* whether a disqualifying opposition to capital punishment can be made "unmistakably clear" as required by Witherspoon v. Illinois, supra, 391 U.S. at 522 n.21, in the absence of an instruction by the trial court that it is the civic duty of each venireman to sit as a juror and to follow the law of the state if he or she can. As the court declared in Boulden v. Holman, supra, 394 U.S. at 483-84:

> "it is entirely possible that a person who has 'a fixed opinion against' or who does not 'believe in' capital punishment might nevertheless be perfectly able as a juror to abide by existing law -- to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case."

A venireman should therefore be instructed, at the least, that the law requires him to "subordinate his personal views to what he ... perceive[s] to be his duty to abide by his oath as a juror and to obey the law of the State," Witherspoon v. Illinois, supra, 391 U.S. at 514-15 n.7. Without such an instruction the statements of Mr. Varney and Mr. Murphy fall far short of establishing that they were either unwilling or unable to subordinate their feelings to the law of Florida, which the trial court would charge them to obey.

*See, e.g., Petition for Writ of Certiorari, Eberheart v. Georgia, No. 74-5174 (filed August 19, 1974) at 65-66. Petition for Writ of Certiorari, Noell v. North Carolina, No. 73-6876 (filed June 11, 1974) at 25; Petition for Writ of Certiorari, Jamette v. North Carolina, No. 73-6877 (filed June 11, 1974) at 17.

B. Exclusion from the Jury That Decided Petitioner's Guilt of Five Veniremen Having Conscientious Scruples Against the Death Penalty Violated Petitioner's Rights Under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States.

Under Florida's post-Furman capital punishment statute, the jury first determines a defendant's guilt or innocence, and at a subsequent, separate proceeding makes a sentencing recommendation. Putting aside impermissible considerations of mere convenience,* a systematic exclusion of the entire class of death-scrupled jurors at the guilt phase of a capital trial would be consistent with the constitutional command of a jury "truly representative of the community," Smith v. Texas, 311 U.S. 128, 130 (1940), only if such jurors were, for some reason, found to be legitimately disqualified or unfit to sit on questions of guilt or innocence. Cf. Witherspoon v. Illinois, 391 U.S. 510, 518 (1968).

The only ground for urging such a legitimate disqualification is that the scruples of such jurors might preclude their finding guilt in a case where another jury might subsequently recommend imposition of the death penalty and such recommendation might be followed by the trial court. There is absolutely no evidence, however, to support this supposition as a fair characterization of the frame of mind or probable behavior of the excluded veniremen in this case or of veniremen who oppose the death penalty generally. Moreover, since a Florida jury's sentencing recommendation is only advisory, a death-scrupled venireman could properly

*See Taylor v. Louisiana, 419 U.S. 522, 535 (1975).

be instructed that ultimate sentencing responsibility in a capital case rests upon the trial judge, not the jury. Since a guilty verdict does not require a death sentence under Florida law, it is surely too sweeping and dogmatic to assume without inquiry that a juror with sentiments against the death penalty would thereby be unable to follow the law and to sit as a fair trier of fact on the question of guilt or innocence.

Neither untested speculation nor approximate rules of thumb can support the denial of vital constitutional rights. At stake here is petitioner's right to a fair trial and, in the final analysis, to the most precious and fundamental of human values -- life itself. "[W]here fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined." Harper v. Virgina Board of Elections, 383 U.S. 663, 670 (1966). In Skinner v. Oklahoma, 316 U.S. 535 (1942), the Court struck down a compulsory sterilization law on equal protection grounds where the criteria for sterilization arbitrarily included some individuals and excluded others:

> "[W]e are dealing with legislation which involves one of the the basic civil rights of man ... . There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty .... [S]trict scrutiny of the classification which a State makes in [such] ... a law is essential ... ." 316 U.S. at 541.

Under appropriately "strict scrutiny" a practice that systematically excludes jurors from trying guilt solely because of their attitudes toward a possible penalty surely

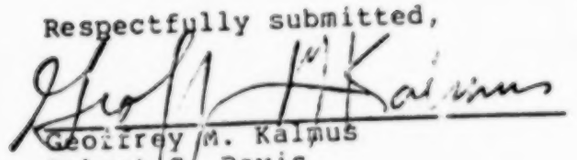
raises grave questions that this Court should resolve. Admittedly, a state could exclude from juries sitting on the guilt question in a capital case any person whose attitude toward the death penalty was such that he or she could not fairly pass on the issue of the guilt of the accused. But that proposition does not justify the state of Florida's assumption that all scrupled persons would function in this fashion; nor does it absolve the state from making a pertinent and practicable inquiry into jurors' fitness before it sweeps from juries a significant portion of the community on the theory that it is unfit. Cf. Taylor v. Louisiana, 419 U.S. 522, 534-35 (1975); Witherspoon v. Illinois, supra, 391 U.S. at 520-21.

This uncritical and unrebuttable presumption that a widely shared and reasonable attitude about capital punishment will affect a juror's performance of his civic duty on the guilt issue is constitutionally arbitrary. The Court should therefore grant review here to decide whether any such untested and unfounded presumption will support the exclusion of death-scrupled jurors from the guilt-determining jury, or whether that wholesale exclusion -- which deprives the accused of a jury that is "truly representative of the community," Smith v. Texas, supra; see Carter v. Greene County Jury Commission, 396 U.S. 320, 330 (1970) -- violates petitioner's right to equal protection and due process.

Conclusion

Petitioner prays that the petition for a writ of certiorari be granted.

Respectfully submitted,



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